SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 223

LEO B. MITTELMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO B. MITTELMAN, *Pro Se,*
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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Leo B. Mittelman, hereby petitions for a rehearing of this Court's October 9, 1967 denial of a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, affirming his conviction for perjury in the swearing to an affidavit submitted for the purpose of obtaining a new trial.

On October 9, 1967, this Court granted review in two cases on its Miscellaneous Docket, *United States ex rel. Garner* v. *Yeager* and *Bruton* v. *United States.** In both of these cases, the constitutional question to be reviewed

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* These cases are now respectively Nos. 704 and 705; on October 9, they were respectively Nos. 66 Misc. and 109 Misc.

was essentially whether a charge to the jury, that the confession of a co-defendant could be used solely against the declarant and not against petitioner, violates due process. (This type of charge previously had been approved by this Court in *Delli Paoli* v. *United States,* 352 U. S. 232.) In the case at bar, the first paragraph of the charge to the injury (reprinted as Appendix A hereto) was totally indistinguishable from the charges to be reviewed here in *Garner* and *Bruton.* It would therefore seem that review should be granted here.

Moreover, the charge here went further. The instructions to the jury (Appendix A) while apparently protecting each defendant against admissions of the other (contained in Grand Jury testimony and affidavits), actually invited the jury to use these admissions if it found that an agreement existed to obtain a new trial for petitioner. (There was no charge of plot, scheme or conspiracy between the defendants). Thus, though the instructions in *Garner* and *Bruton* protected the petitioners there to the extent that the jury could perform the mental gymnastics (considered naive by most authorities) required by the exclusionary charge, the jury here was virtually urged to use the admissions of each against the other.

If it be argued that it was permissible to charge in the manner indicated because of joint activity on the part of petitioner and co-defendant Jones, this would not alter our argument. The question remains the same as in *Garner* and *Bruton.* In both cases the defendants acted jointly in the commission of their crimes. (As to *Garner,* see *State* v. *Sullivan,* 43 N. J. 209, 216, 221, 236; as to *Bruton* see his petition here, p. 2, noting that Bruton was tried as an accomplice with his co-defendant.)

In addition, in the instant case the evil inherent in the charge was aggravated by the fact that the joinder of these *particular* defendants in one indictment precluded

each from calling the other as a witness. (See Point IV, pages 42 et seq. in petitioner's petition for a writ herein, No. 1455, October Term 1966.)

If *Garner* and *Bruton* deserve review, the case at bar deserves review *a fortiori*—for these reasons:

1. *Garner* is a collateral attack, on a state conviction. The case at bar is a direct non-collateral attack, upon a federal conviction.

2. The charge here was not as clear as in *Garner* and *Bruton*. See, n. 1, *supra*, and *infra* Appendix A.

3. In the case at bar, objection was made and exception noted to the challenged instruction. In *Bruton*, no exception was taken to the instruction (Bruton's petition, p. 19).

4. In the case at bar, petitioner Jones had repeatedly requested a severance. In *Bruton*, no motion for a severance had been made (Bruton's petition, pp. 6, 18).

Petitioner respectfully requests that this petition be considered and weighed with the petition of Paul R. Jones heretofore filed in this Court (No. 135 [sic] October Term, 1966).

Petitioner avers that this petition is filed in good faith and not for delay. It is filed pursuant to Rule 58(2) of this Court. Said petition is restricted to grounds confined to intervening circumstances of substantial and controlling effect and other substantial grounds available to petitioner.

CONCLUSION

Petition for rehearing should be granted.

Respectfully submitted,

Leo B. Mittelman, *Pro Se*,
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Appendix A

I already have instructed you that the Grand Jury testimony of each defendant was received into evidence only as to the defendant whose testimony it was and not as to the other defendant. But to be sure, I repeat: The Grand Jury testimony of Mittelman is received only as to Mittelman and not as against Jones and, similarly, the Grand Jury testimony of Jones is received only as to Jones and not as against Mittelman. You are not to consider the Grand Jury testimony of Mittelman in determining the guilt or innocence of Jones and you are not to consider the Grand Jury testimony of Jones in determining the guilt or innocence of Mittelman.

Similarly, Mittelman's affidavit is not admissible as to Jones and Jones' affidavit is not admissible as to Mittelman unless you first find that the government has established Jones' connection with Mittelman's affidavit, and Mittelman's connection with Jones' affidavit.

By this I mean the following: If you find that Mittelman, either alone or through his duly authorized attorney, knew about, secured and procured Jones' affidavit and knew of the substance of the contents of Jones' affidavit and submitted Jones' affidavit in support of Mittelman's application for a new trial, then you may decide that Mittelman is bound by Jones' affidavit and the connection would have been established if you so find.

Similarly, if Jones knew at the time he prepared and signed and swore to his affidavit, if he did swear to his affidavit, that he was submitting this affidavit for the purpose of assisting Mittelman in obtaining a new trial, and if you find or infer, an inference being evidence also, that Jones knew the reason why and the purpose for his affidavit, and if you infer and so find that Jones discussed with Mittelman or with Mittelman's duly authorized attorney his affidavit, as part and parcel of a common agreement or undertaking to secure a new trial by means of a motion for Mittelman, then you may consider, if you so find, Jones' (*sic*) affidavit with respect to Mittelman (*sic*) [GA 115a-116a].